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No. 99-1680

In The

Supreme Court of the United States

CITY NEWS AND NOVELTY, INC.,

Petitioner,

v.

CITY OF WAUKESHA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF WISCONSIN, DISTRICT II

BRIEF FOR STATES OF ALABAMA, COLORADO, NEBRASKA AND WISCONSIN AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE

The respondent, City of Waukesha, Wisconsin, has adopted by ordinance the municipal administrative review procedure established by state law. *See* Waukesha, Wis., Municipal Code § 8.195(11) (1995), adopting Wis. Stat. ch. 68. The petitioner, City News and Novelty, Inc., contends that this statutory procedure is unconstitutional as applied to the review of municipal licensing decisions

affecting businesses which engage in activity protected by the First Amendment.

The Attorney General of Wisconsin is obligated to defend the statutes of the State of Wisconsin in any court in which their validity may be challenged. *See* Wis. Stat. §§ 165.25(1) and 806.04(11). And when addressing the constitutionality of a statute of statewide application where the party defending the statute is someone other than the attorney general, this Court considers the views of the state's chief law enforcement officer highly relevant. *See New York v. Uplinger*, 467 U.S. 246, 247 n.1 (1984).

Wisconsin and the other states are also interested in supporting the legitimate efforts of their constituent municipalities to control the deleterious secondary effects of businesses which sell sexually explicit material within their boundaries and the boundaries of the states. Thus, the states support the respondent, City of Waukesha.

SUMMARY OF ARGUMENT

To determine the procedures which must be followed when a government entity seeks to terminate a right or privilege it has previously granted, the Supreme Court has evolved a test which balances three factors: (1) the nature and weight of the private interest affected, (2) the risk of an erroneous deprivation of this interest using existing procedures compared with alternative or additional procedures and (3) the government's concern with both the interest involved and the procedures used to regulate it. The factors considered in this test may appropriately be applied in determining what procedures are constitutionally required to review the refusal of a municipality to renew the license of a business which engages in expression protected by the First Amendment.

Not all expression is protected equally by the First Amendment. Sexually explicit material is afforded less protection than political debate. Commercial speech also occupies a lower position on the scale of constitutional values. Thus, the petitioner's interest in selling sexually explicit material rests at the lower end of the spectrum of protection provided by the First Amendment because of its relatively negligible value to society.

There is not much risk of an erroneous deprivation of this limited interest under existing procedures, first of all because the decision to grant or deny the renewal of a license is essentially a ministerial duty of the city clerk based exclusively on determinations of empirical fact, in particular whether the applicant has violated the regulatory provisions of the ordinance. There is less risk of error in making a relatively simple retrospective determination of fact than in attempting to shape the more complex and often subjective evaluations involved in assessing the worthiness of either an expressive work or the person who wants to exhibit it as in other cases which have come before this and other federal courts.

The codified administrative review procedure minimizes the risk that any initially erroneous decision will remain uncorrected for long. An applicant whose license is not renewed by the city clerk can obtain prompt independent review by the Administrative Review Appeals Board ("Board").

The Board must promptly hold an adversary hearing at which the applicant can present the sworn testimony of witnesses and cross-examine the witnesses presented by the municipality with the assistance of an attorney. Since the expression engaged in by the applicant plays no role in the licensing decision, there is no need for any special sensitivity to freedom of expression, as in censorship cases, and thus no need for a judge to conduct the adversary review proceeding.

A final decision must be made within twenty days of the commencement of the hearing. Thus, the entire relicensing process can be completed before the license expires, thereby automatically maintaining the status quo throughout the administrative process.

Considering the nature of the simple factual decision to grant or deny the renewal of a license, and the availability of prompt comprehensive independent administrative review of the initial decision, there is little remaining risk that the final decision which emerges from this administrative process will be erroneous.

The Wisconsin procedure provides that a disappointed applicant may initiate judicial review of a final administrative decision. Since there has already been a factual determination that the licensee violated content-neutral time, place and manner regulations regarding the operation of its business, there is no reason why the government should have the burden of going to court to prove its case all over again. Instead, as in other similar situations, the burden should be on the party found guilty of wrongdoing to initiate the process by which it seeks to overturn that finding.

Moreover, a judicial decision on review of the review of the initial decision to refuse to renew a license will be of little assistance in reducing the already minimal risk of error even more. Since the licensing decision is essentially factual, the review conducted by the court will necessarily be limited to the question of whether any rational trier of fact could have made it. Because the value of this review as yet another layer of risk-reducing procedure is limited, there is little reason to impose fixed time limits within which the court must make a decision.

Similarly, because the risk of error following administrative review is low, and because judicial reversal of the final administrative decision will be infrequent, there is

no reason to automatically allow businesses to continue to operate in all cases after the final administrative decision as part of the legislatively prescribed process of review. Instead, in those rare instances where it appears that the administrative process might have made a mistake, the rights of a business whose license has not been renewed may be fully protected pending judicial review by its ability to ask the reviewing court for a temporary injunction to maintain the status quo.

In addition, any error in refusing to renew the license of a business which sells sexually explicit material or to permit the business to continue to operate pending judicial review of the licensing decision can be compensated by paying the proprietor money damages for any lost profits, at least when the refusal to renew the license was premised on a purpose to prevent the licensee from exercising protected rights.

The city and the state share an important interest in combating the adverse secondary effects of a business which sells sexually explicit material. Both units of government also have a legitimate interest in the efficient administration of justice including the right of a court to control its own calendar.

Balancing these governmental interests against the lesser protection afforded to the private interest in selling sexually explicit material, the efficacy of existing administrative review procedures in reducing the risk of error in a decision refusing to renew the license of a business which sells sexually explicit material and the limited benefit which might be provided by additional requirements for the judicial review of the administrative decision, it is sufficient if the licensing scheme provides for prompt access to the courts rather than a prompt judicial decision and if a judicial procedure such as an injunction is available to maintain the status quo in appropriate cases after the business has sought review.

ARGUMENT

WHEN A GOVERNMENTAL LICENSING SCHEME PROVIDES COMPREHENSIVE ADMINISTRATIVE PROCEDURES WHICH MINIMIZE THE RISK OF AN ERRONEOUS REFUSAL TO RENEW THE LICENSE OF A BUSINESS THAT SELLS SEXUALLY EXPLICIT MATERIAL, IT IS SUFFICIENT TO PROVIDE FOR PROMPT ACCESS TO THE COURTS RATHER THAN A QUICK JUDICIAL DECISION, AS LONG AS A JUDICIALLY ISSUED INJUNCTION IS AVAILABLE TO MAINTAIN THE STATUS QUO WHILE THE BUSINESS PURSUES FURTHER REVIEW.

In this case, the Court has been asked to determine what procedures are constitutionally required to review the refusal of a municipality to renew the license of a business which engages in expression protected by the First Amendment.[1]

This is not the first time the Court has had the task of determining the procedures which must be followed when a

[1]Ordinarily, a federal court should not anticipate a question of constitutional law before the need to decide it arises, and should accordingly refrain from formulating any rule of constitutional law which is broader than required to decide the question presented by the facts in the case where it must be applied. *See Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501 (1985). Even in First Amendment cases where the overbreadth doctrine might otherwise be apt, the court should limit its inquiry when the party challenging a statute engages in expression which the statute purports to proscribe, thus assuaging any concern that protected speech will be discouraged for want of a proper party to question the effect of the law. *See id.* at 502-04.

government entity sought to terminate some right or privilege it had previously granted. In a series of cases, rather, the Court has specified the procedures required in a variety of analogous situations. *See, e.g., Gilbert v. Homar*, 520 U.S. 924 (1997) (suspension of public employment); *Federal Deposit Ins. Corp. v. Mallen*, 486 U.S. 230 (1988) (suspension of bank officer); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985) (termination of public employment); *Mackey v. Montrym*, 443 U.S. 1 (1979) (suspension of driver's license); *Mathews v. Eldridge*, 424 U.S. 319 (1976) (termination of social security benefits); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (revocation of probation); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (revocation of parole); *Bell v. Burson*, 402 U.S. 535 (1971) (suspension of driver's license); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (termination of welfare benefits).

To determine what process is constitutionally due in any particular situation the Court has evolved a test which balances three factors: (1) the nature and weight of the private interest affected, (2) the risk of an erroneous deprivation of this interest using existing procedures compared with alternative or additional procedures and (3) the government's concern with both the interest involved and the procedures used to regulate it. *See, e.g., Gilbert*, 520 U.S. at 931-32; *Mackey*, 443 U.S. at 10-11; *Mathews*, 424 U.S. at 335.

This test has usually been used in cases involving interests protected generically under the Due Process Clause. But the factors it considers are just as relevant and helpful when the interest limited by the procedure in question is protected more specifically by the First Amendment. *See Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 334-35 (1985). *See also 11126 Baltimore Blvd., Inc. v. Prince George's County, Md.*, 58 F.3d 988, 997 (4th Cir. 1995) (en banc) (time during which prior restraint on speech may continue to operate may vary in different contexts

requiring examination of type of judgments to be made by government and hardship placed on applicant by restraint). The nature of a claim regarding the adequacy of particular procedures to prevent an erroneous deprivation of rights is the same regardless of the right at stake. Only the specific considerations to be weighed on the scales are different. And applying an established formula in resolving the constitutional question could help channel the Court's reasoning and perhaps resolve the proliferation of views which emerged in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990).

A. The Petitioner's Interest In Selling Sexually Explicit Material Lies At the Lower End Of The Spectrum Of First Amendment Protection.

The petitioner, City News and Novelty, Inc., which is in the business of selling sexually explicit material, undoubtedly engages in expression protected by the First Amendment. *See FW/PBS, Inc.*, 493 U.S. at 224. But the First Amendment is not absolute. *See Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995); *Miller v. California*, 413 U.S. 15, 23 (1973). And not all expression is protected equally because not all expression is equally important.

Society's interest in protecting erotic materials which have some arguably artistic value, thereby lifting them above the level of otherwise unprotected obscenity, *see generally Miller*, 413 U.S. at 23-25, "is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976). *See also Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565 (1991) (bar room nude dancing involves only barest minimum of protected expression); *Connick v. Myers*, 461 U.S. 138, 145 (1983) (speech on public issues occupies highest rung on hierarchy of First Amendment values).

Moreover, the selling of expression imbues it with a commercial character. *See Breard v. City of Alexandria, La.*, 341 U.S. 622, 642 (1951). And although speech which is sold for profit is still afforded some protection, it too is less than the protection given ideological communication, commensurate with the subordinate position of commercial speech on the scale of constitutional values. *See Florida Bar*, 515 U.S. at 623; *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978).

Thus, the private interest in selling sexually explicit material at stake in this case lies at the lower end of the spectrum of protection provided by the First Amendment because of its relatively negligible value to society.

The Court did not consider the diminished importance of the interest in profiting from erotic representations in trying to decide in *FW/PBS, Inc.*, whether all the procedural protections required by *Freedman v. State of Maryland*, 380 U.S. 51 (1965), to validate a scheme for imposing prior restraints on the exhibition of films were also necessary in a scheme which licensed adult businesses. Instead, it appeared to elevate this limited interest to unmerited parity with speech which involves the exposition of ideas. *See FW/PBS, Inc.*, 493 U.S. at 226 (plurality opinion of O'Connor, J.); *id.* at 239-40 (Brennan, J., concurring).

Now, however, the Court should consider that the interest at stake here is not as important as other interests protected by the First Amendment in determining what procedures are necessary to reduce the risk of an erroneous deprivation of that interest.

B. The Risk Of An Erroneous Deprivation Of The Interest In Selling Sexually Explicit Material, Which Is Already Minimal Under Existing Procedures, Would Not Be Significantly Diminished Further By Additional Requirements.

1. The initial decision whether to renew a license is based on a determination of empirical fact rather than any value judgment regarding either the quality of the material sold or the qualifications of the seller.

There is not much risk of an erroneous deprivation of the interest in selling sexually explicit material under existing procedures, first of all because of the nature of the decision which must be made to determine whether the license of an adult entertainment business will be renewed.

Under the Waukesha adult establishments ordinance, the standards for the original issuance of a license also apply to an application for renewal. *See City News and Novelty, Inc. v. City of Waukesha*, 231 Wis. 2d 93, 107, 604 N.W.2d 870, 876 (Ct. App. 1999). Applicants are entitled to renewal of a license if they are at least eighteen years of age, if they provide all the information relevant to their application, and if they have not been found liable for violating any of the regulatory provisions of the ordinance within the preceding five years. *See* Waukesha, Wis., Municipal Code § 8.195(3)(e) and (4) (1995).

Thus, whether to grant or deny a renewal is essentially a ministerial duty based exclusively on determinations of empirical facts, many if not most of which will have already been determined in previous judicial proceedings brought on charges of violating the ordinance. The city clerk, who initially decides whether a license is renewed, *see* Waukesha

Municipal Code § 8.195(3)(a), does not exercise any discretion to make any value judgements about either the quality of the material, as in *Freedman*, or the qualifications of the licensee, as in *FW/PBS, Inc.*

Nor is the clerk required to decide complicated constitutional questions. Any complaints about the constitutionality of either the substantive or procedural features of the applicable ordinances or statutes may be raised by immediately commencing a declaratory judgment action in the courts without the necessity of exhausting ineffective administrative remedies first. *See State ex rel. 1st Nat'l Bank v. M&I Peoples Bank*, 82 Wis. 2d 529, 544-46, 263 N.W.2d 196, 203-04 (1978). Alternatively, constitutional attacks on either the enactments themselves or the way they are applied in a particular case may be made later on judicial review of an administrative decision. *See id.*

There is less risk of error in making no more than a relatively simple retrospective determination of whether an event has in fact occurred than in attempting to shape the more complex and often subjective evaluations involved in assessing the worthiness of either an expressive work or the person who wants to exhibit it. *See Mackey*, 443 U.S. at 13-14. *Cf. Morrissey*, 408 U.S. at 479-80 (contrasting factual and judgmental decisions in parole revocation process). There is also less threat of censorship. *See Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251, 1256 (11th Cir. 1999), *cert. denied*, 120 S. Ct. 1423 (2000).

2. The applicable administrative review procedure minimizes the risk that any initially erroneous decision will remain uncorrected for long.

The City of Waukesha adult establishments ordinance in partnership with the State of Wisconsin municipal administrative procedure code provide administrative procedures which minimize the risk that any initially erroneous decision will remain uncorrected for long.

To begin with, the city clerk must notify the applicant whether a license has been renewed within twenty-one days. *See* Waukesha Municipal Code § 8.195(3)(c). If the license is not renewed, the applicant may request a public hearing, which must be held within ten days. *See* Waukesha Municipal Code § 8.195(3)(d) (as amended Sept. 20, 2000). Thus, there is not only a prompt decision on the reissuance of a license, but an opportunity for prompt review of that decision.

The hearing must be in conformity with the provisions of Wis. Stat. § 68.11(2) and (3). *See* Waukesha Municipal Code § 8.195(3)(d). Thus, the review must be conducted by an impartial decision-maker who was not involved in the initial decision. *See* Wis. Stat. § 68.11(2). Waukesha has created an Administrative Review Appeals Board to perform this function. *See City News and Novelty, Inc.*, 231 Wis. 2d at 102, 604 N.W.2d at 876. The Board must conduct an adversary hearing at which the applicant can present the sworn testimony of witnesses and cross-examine witnesses presented by the municipality with the assistance of an attorney. *See* Wis. Stat. § 68.11(2).

In *Freedman*, this Court said that the adversary proceeding had to be conducted by a judge. *See id.*, 380 U.S. at 58. But *Freedman* was a censorship case. So a judicial determination was required to insure the "sensitivity to

freedom of expression" necessary when the determination of whether a film could be shown was based on the content of the material. *See id.*

This is a licensing case. There is no attempt to prevent anyone from selling any particular material, and the content of the material sold is otherwise irrelevant in determining whether a license will be renewed. The only question is whether the licensee has violated the regulatory provisions of the ordinance. Since the expression engaged in by the licensee plays no role in the licensing decision, there is no need for any special "sensitivity to freedom of expression" in the independent review of the decision whether to renew a license. As in other administrative review procedures, therefore, there is no need for a judge to conduct the adversary proceeding which accomplishes that review. *See Morrissey*, 408 U.S. at 486 and 489.

This *de novo* evidentiary hearing, which offers not only independent review but independent collegial review, presents an unlimited opportunity to identify and correct any error which might have been made in the initial license renewal decision, including any error in previous convictions for violating the ordinance. The licensee may relitigate both the question of whether a violation occurred and whether any violation committed by an employee should be attributed to the licensee.

A final decision must be made within twenty days of the commencement of the hearing. *See* Waukesha Municipal Code § 8.195(3)(d). This means that the entire relicensing process can be completed in a total of fifty-one days. And since the application for renewal must be made at least sixty days before the license expires, *see* Waukesha Municipal Code § 8.195(7)(a), a licensee whose application for renewal is denied can have a final administrative determination before the license expires, thereby automatically maintaining the status quo throughout the administrative review process.

This case is different from both *Freedman* and *FW/PBS, Inc.*, therefore, not only because of the significant difference in the nature of the initial licensing decision, but also because of the availability of effective administrative procedures to promptly review that decision which were not offered in either the Maryland or Dallas licensing schemes. Considering the nature of the simple factual decision to grant or deny the renewal of a license and the availability of prompt comprehensive independent administrative review of the initial decision, there is little remaining risk that the final decision which emerges from this administrative process will be erroneous.

3. Because it is unlikely that judicial review of the final administrative decision will uncover additional error that has not already been corrected, there is no reason to require a prompt judicial decision.

The Wisconsin procedure allows a disappointed applicant to initiate judicial review of a final administrative decision by certiorari, *see* Wis. Stat. § 68.13, which is a constitutionally sufficient means of reviewing licensing decisions implicating protected speech. *See Graff v. City of Chicago*, 9 F.3d 1309, 1325 (7th Cir. 1993) (en banc), *cert. denied*, 511 U.S. 1085 (1994).

In *Freedman*, the Court required the government to go to court to prove that a particular film was subject to censorship. *See id.*, 380 U.S. at 58. But censorship is not involved here. The issue is whether the licensee has violated content-neutral time, place and manner regulations regarding the operation of its business. And by the time the judicial review proceedings are commenced, there will already have been a factual determination in an adversary proceeding, perhaps in a prior judicial proceeding, that there was a violation.

There is no reason why the government should be required to go to court to prove again that the evidence it presented at the adversary hearing was sufficient to prove that the licensee was liable for violating the ordinance. Instead, the burden should be on the licensee as in every other case where a party found guilty of wrongdoing seeks to contest the sufficiency of the evidence to prove guilt. *See generally Martinez v. Court of Appeal of California*, 120 S. Ct. 684, 691 (2000) (defendant initiates appellate process seeking to overturn finding of guilt).

Moreover, a judicial decision on review of the review of the initial decision to refuse to renew a license will be of little additional assistance in reducing the minimal risk of error even further. Since the decision is essentially factual, the review conducted by the court will necessarily be constrained. *See Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573-75 (1985). Indeed, even when reviewing a claim that a litigant was engaged in protected speech, which is not in issue under the Waukesha licensing scheme, a court must defer to the findings of the trier of fact in making an independent assessment of the constitutional question. *See Hurley v. Irish-American Gay Group of Boston*, 515 U.S. 557, 567 (1995).

It is the responsibility of the trier of fact to resolve conflicts in the evidence, weigh the evidence and draw reasonable inferences from it. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979). A reviewing court, therefore, cannot assess the credibility of the witnesses or weigh the evidence in reviewing the sufficiency of the evidence. *See Burks v. United States*, 437 U.S. 1, 16 (1978). And if the historical facts support conflicting inferences, the court must defer to the factfinder's choice. *See Jackson*, 443 U.S. at 326.

The question for the court is simply whether any rational trier of fact could have made the decision under review. *See id.* at 319 and 324. So if there is a plausible account of the evidence which supports the conclusion of the trier of fact, a reviewing court may not reverse even though as factfinder it would have viewed the evidence differently and reached a different conclusion. *See Anderson*, 470 U.S. at 573-74.

Judicial review, therefore, cannot correct any possible errors made by the factfinder in determining credibility, weighing the evidence or drawing inferences from the evidence. It can correct only the most obvious errors in concluding that the evidence found to be credible, the evidence given weight and the inferences drawn from that evidence are sufficient to establish the factual proposition that the applicant violated the regulatory provisions of the ordinance. But it is those obvious errors in reaching the ultimate conclusion that the previous administrative review process is most likely to self-correct.

Because judicial review of a factual administrative decision is unlikely to uncover additional reversible error which has not already been corrected, its value as yet another layer of risk-reducing procedure is limited and there is little reason to impose fixed time limits within which a court must complete its review and make a decision which will not have much effect in further protecting the rights of the applicant. *Cf. Boss Capital, Inc.*, 187 F.3d at 1256 (need for prompt judicial decision less compelling for licensing decision than for censorship).

4. The rights of a business which engages in protected expression are fully protected by the availability of a judicially issued injunction to maintain the status quo during the duration of the review process.

In a situation involving the renewal of a license of an existing business, the rights of the business are fully protected if the status quo is maintained and it is permitted to continue to operate while the court reviews the adverse administrative decision. *See 4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108, 1114 (9th Cir. 1999). As long as the status quo is maintained, the review process can continue indefinitely without risking the suppression of protected expression. *See id.*

But because the risk of error following administrative review is low under the Waukesha scheme, and because judicial reversal of the final administrative decision will be infrequent, there is no reason to automatically allow businesses to continue to operate in all cases after the final administrative decision as part of the legislatively prescribed process of review.

Instead, in those rare instances where it appears that the administrative process might have made a mistake, the rights of a business whose license has not been renewed may be fully protected pending judicial review by its ability to ask the reviewing court for a temporary injunction to maintain the status quo pending disposition of the proceeding. *See* Wis. Stat. §§ 781.02 and 813.02(1). Under Wisconsin law, it is a virtually imperative duty of the court to issue an injunction when there is a reasonable probability of success on the merits and disturbance of the status quo pending the resolution of the dispute would cause serious and irreparable injury to the complaining party. *See Shearer v. Congdon*, 25 Wis. 2d 663, 668, 131 N.W.2d 377, 381 (1964).

Both *Freedman* and *FW/PBS, Inc.* involved decisions whether to issue a first permit to begin disseminating protected material so that, unlike the present case, maintaining an existing situation in which the petitioners were permitted to continue to disseminate material as they had in the past was not a viable option in safeguarding their constitutional rights.

Besides, since businesses regulated by the Waukesha adult establishments ordinance are concerned with selling sexually explicit material rather than advocating ideas, any error in refusing to renew a license or to permit the business to continue to sell its wares pending judicial review of the licensing decision can be compensated by paying the proprietor money damages for any profits lost during the period the business was erroneously closed, at least when the refusal to renew the license was premised on a corrupt or malicious motive such to prevent the licensee from exercising protected rights. *See Allstate Ins. Co. v. Metropolitan Sewerage Comm.*, 80 Wis. 2d 10, 17-18, 258 N.W.2d 148, 151 (1977).

Thus, the very nature of the limited private interest involved in this case makes it unnecessary to insist on either a prompt judicial decision or automatic maintenance of the status quo pending that decision to insure that the real interest will not be lost by a deliberately discriminatory decision which may not be corrected administratively. It is money not expression which may be lost. And money can be repaid.

C. The Government Has Substantial Interests In Controlling The Deleterious Secondary Effects Of Businesses Which Sell Sexually Explicit Material, And In The Efficient Operation Of The Judicial System.

The purpose of the City of Waukesha in enacting its adult establishments ordinance was not to control the content of any communication engaged in by businesses selling sexually explicit material, but only to combat the adverse secondary effects of such businesses, including a rise in crime and a degradation of the quality of the neighborhoods where they are located. *See* Waukesha Municipal Code § 8.195, Introduction. Especially where the renewal of a license is concerned, Waukesha has no interest in prior restraint of protected expression by insisting on approving it before it can be enjoyed. *See generally Near v. State of Minnesota*, 283 U.S. 697, 713 (1931) (defining prior restraint). Instead, the city wants to prevent the repetition of past conduct which has contributed to the secondary effects with which it is concerned, such as permitting minors to loiter and patrons to engage in sex on the premises. *See City News and Novelty*, 231 Wis. 2d at 101-02, 604 N.W.2d at 826.

This is a substantial governmental interest, shared by the State of Wisconsin, which should be accorded respect in assessing the constitutionality of a law which imposes only content-neutral time, place and manner regulations on the conduct of the business. *See City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 47-50 (1986).

Furthermore, the state and its municipalities have a legitimate interest in the efficient administration of justice. *See Martinez*, 120 S. Ct. at 692. This interest surely includes the right of the courts to control their own calendars so that the justice they dispense is not only swift but also sure. *See generally Mallen*, 486 U.S. at 244 (public interest in correct

judicial decision counsels against constitutional imperative that might require overly hasty decision making).

Balancing these governmental interests against the lesser protection afforded to the private interest in selling sexually explicit material, the efficacy of existing administrative review procedures in reducing the risk of error in a decision refusing to renew the license of a business which sells sexually explicit materials and the limited benefit which might be provided by additional requirements for the judicial review of the administrative decision, it is sufficient if the licensing scheme provides for prompt access to the courts rather than a prompt judicial decision and if a judicial procedure such as an injunction is available to maintain the status quo in appropriate cases after the business has sought review.

CONCLUSION

It is therefore respectfully submitted that the decision of the Court of Appeals of Wisconsin, District II, upholding the constitutionality of the licensing scheme embodied in Waukesha, Wis., Municipal Code § 8.195 and Wis. Stat. ch. 68 should be affirmed.

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